



Nez Perce

TRIBAL EXECUTIVE COMMITTEE

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October 12, 2020

Submitted via email to: whitney.rowley@deg.idaho.gov

Ms. Whitney Rowley
Air Quality Division
Idaho Department of Environmental Quality
1410 North Hilton
Boise, ID 83706-1255

Re: Nez Perce Tribe's Comments on Midas Gold's application to Idaho Department of Environmental Quality to Construct and Operate an Air Pollution-Emitting Source (Docket No. AQ-1667) for the proposed Stibnite Gold Project

Dear Ms. Rowley:

On behalf of the Nez Perce Tribe ("Tribe"), I submit the attached comments on the application by Midas Gold Idaho, Inc. ("Midas Gold") to the state of Idaho Department of Environmental Quality ("IDEQ"), for a permit to construct and operate an air pollution-emitting source ("PTC permit") located at the intersection of Forest Service Roads NF-374 and NF-412 for the proposed Stibnite Gold Project ("Project").

The Tribe is a federally recognized Indian tribe whose aboriginal territory extends through north-central Idaho, northeast Oregon, southeast Washington, and parts of Montana. Since time immemorial, the Tribe has occupied and used over 13 million acres of land and waters for subsistence, ceremonial, commercial, and religious purposes. The Tribe's 1855 Treaty ("Treaty") with the United States secured, among other guarantees, a permanent homeland for the exclusive use and benefit of the Nez Perce people, the exclusive right to fish at all usual and accustomed places, and off-reservation hunting, fishing, gathering, and pasturing rights.¹ Under the United States Constitution, "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."²

¹ Treaty with the Nez Percés, June 11, 1855, 12 Stat. 957.

² U.S. Const. art. VI, cl. 2.

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The Project is located entirely within the Tribe's aboriginal territory as well as within the area determined by the Indian Claims Commission to have been exclusively used and occupied by the Tribe. The Project is also located on the Krassel Ranger District of the Payette National Forest. The lands comprising the Payette National Forest are open and unclaimed and subject to the Tribe's Treaty-reserved rights. The Tribe's Treaty-reserved right to take fish and other resources presumed the continued existence of those resources. Thus, the Treaty secures to the Tribe the continued existence of those biological conditions necessary for the resources that are the subject matter of the Treaty. Harm to these resources and their habitat will harm the Nez Perce people.

Clean, clear air is a critical component to ensuring the health and resiliency of the Tribe's Treaty-reserved resources. Air pollution reduces visibility, which can impair cultural and ceremonial practices for Tribal members and reduce enjoyment of these special places.³ Air pollution causes a host of environmental and human health problems, including damage to culturally important plants, sensitive forests, and fish habitat, acidification of lakes and streams, depletion of soil nutrients, aggravated asthma, heart attacks, and premature death.⁴ Impacts can be especially harmful to at-risk ecosystems⁵ and especially harmful for sensitive human populations such as asthmatics, children, the elderly, people with diabetes, and people with heart or lung disease.⁶

The Tribe, as a co-manager of its treaty-reserved resources, plays a leading role in the restoration of the East Fork South Fork Salmon River and South Fork Salmon River fishery, expending approximately \$2.5 million annually to restore Chinook salmon runs in both rivers, through hatchery supplementation, fishery research, and watershed restoration. Further degradation of habitat in the Project area and any additional degradation of the East Fork South Fork Salmon River's and South Fork Salmon River's water quality and fishery is unacceptable to the Tribe as it would further harm the physical, cultural, spiritual and economic health of the Tribe and its members, and of the surrounding communities.

The Tribe has reviewed the Midas Gold proposed PTC permit and Statement of Basis for the Stibnite Gold Project. For the reasons outlined in the attached comments, the Tribe disagrees with IDEQ's determination to issue the required PTC permit. Due to inadequate emissions characterizations and proposed PTC permit requirements, combined with inadequate state compliance monitoring and enforcement resources, constructing and operating an open-pit gold

³ Western Regional Air Partnership., *Regional Air Quality and the Regional Haze Rule: Information and Resources for Tribal Professionals*, https://www.wrapair2.org/pdf/Task1.1.1-RegionalHazeFactSheet_11.21.19final.pdf (last visited Oct. 9, 2020).

⁴ *Ibid.*

⁵ Industrial Economics, Inc., *Effects of Air Pollutants on Ecological Resources: Literature Review and Case Studies*, (Mar. 2011), <https://www.epa.gov/sites/production/files/2016-01/documents/ecofinalreport.pdf>.


⁶ U.S. Environmental Protection Agency, *Patient Exposure and the Air Quality Index*, (Aug. 2017), <https://www.epa.gov/pmcourse/patient-exposure-and-air-quality-index>.

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mine, on-site ore processing, ore concentration and refining, and ancillary equipment are not achievable without causing or contributing to a violation of the federal Clean Air Act's primary and secondary National Ambient Air Quality Standards ("NAAQS") for PM10. Project activities will therefore injure or unreasonably affect human or animal life or vegetation and the Tribe's Treaty-reserved resources. IDEQ must accordingly deny Midas Gold's application.

The Nez Perce Tribe appreciates this opportunity to comment. If you have any questions or require clarification from the Tribe, please do not hesitate to contact Mike Lopez, Senior Staff Attorney for the Tribe's Office of Legal Counsel, at 208-843-7355.

Sincerely,



Shannon F. Wheeler
Chairman

cc: Chris Hladick, Administrator, U.S. Environmental Protection Agency (EPA) Region 10
Krishna Viswanathan, Air and Radiation Division Director, EPA Region 10
Linda Jackson, Forest Supervisor, U.S. Forest Service Payette National Forest
Ann Mebane, Air Program Manager, U.S. Forest Service Intermountain Region
Tim Allen, Meteorologist, U.S. Fish and Wildlife Service

**NEZ PERCE TRIBE'S COMMENTS ON AQ-1667
MIDAS GOLD IDAHO, INC., APPLICATION FOR A PERMIT
TO CONSTRUCT AND OPERATE AN AIR POLLUTION-EMITTING SOURCE
FOR THE STIBNITE GOLD PROJECT**

Inadequate Characterization and Control of Emissions

Fugitive Emissions from Tailings Storage Facility

The Midas Gold PTC permit does not, but must, include the potential for fugitive emissions from the Project tailings storage facility. There are no fugitive emissions from the tailings storage facility in the emissions inventory (see Statement of Basis, Appendix A, Table 8). While taking an aerial tour of the Project area and the Thompson Creek Mine in 2018, the Tribe saw significant fugitive emissions from the tailings storage facility of the Thompson Creek Mine, and the Tribe expects similar emissions from the Project. In addition to PM10 emissions, fugitive tailings would have higher metals and cyanide concentrations than other fugitive emissions at the mine and would thus be more injurious to the environment. The potential to emit concentrations of PM10, metals and cyanide from the tailings storage facility should be included in the emissions inventory and modeled emissions scenarios and appropriate emissions controls should be identified in the permit.

Mercury Emissions

Mercury emissions from the lime kiln are not quantified. Although there are no mercury limits or controls proposed for emission units associated with the lime production in the permit, there is mercury in the carbonate rock at Stibnite and mercury in the limestone will be released from the kiln.^{1,2} Mercury emissions should be accurately characterized, and there should be controls for mercury on the lime kiln regardless of the legal loopholes in the Idaho Administrative Procedures Act rules.

Public Access Road is Ambient Air

IDEQ erred in identifying that the public access road between Stibnite Road at Sugar Creek and Thunder Mountain Road at Meadow Creek is not ambient air. It is incorrect to consider the Project's controlling the public access road as a reason for the Project to escape NAAQS regulations. As the U.S. Forest Service has identified in their Stibnite Gold Project Draft Environmental Impact Statement,

The term "ambient air," for modeling purposes, refers to a defined area **where the public has access** that is subject to the National Ambient Air Quality Standards

¹ SRK Consulting, Inc., *Stibnite Gold Project Baseline Geochemical Characterization Report*, (May 2017), <https://usfs-public.app.box.com/s/4r3aeu4waxlvu1r7aew2ydpqpiq1pkpj/file/705023399306>.

² Environmental Protection Agency, *Locating and Estimating Air Emissions from Sources of Mercury and Mercury Compounds*, (Dec. 1997),

<https://nepis.epa.gov/Exe/ZyNET.exe/2000D3YR.txt?ZyActionD=ZyDocument&Client=EPA&Index=1995%20Thru%201999&Docs=&Query=&Time=&EndTime=&SearchMethod=1&TocRestrict=n&Toc=&TocEntry=&QField=&QFieldYear=&QFieldMonth=&QFieldDay=&UseQField=&IntQFieldOp=0&ExtQFieldOp=0&XmlQuery=&File=D%3A%5CZYFILES%5CINDEX%20DATA%5C95THRU99%5CTXT%5C00000009%5C2000D3YR.txt&User=ANONYMOUS&Password=anonymous&SortMethod=h%7C-&MaximumDocuments=1&FuzzyDegree=0&ImageQuality=r75g8/r75g8/x150y150g16/i425&Display=hpfr&DefSeckPage=x&SearchBack=ZyActionL&Back=ZyActionS&BackDesc=Results%20page&MaximumPages=1&ZyEntry=1>.

(NAAQS). The NAAQS are promulgated to protect public health and welfare. Long-standing EPA policy has defined “ambient air” as “that portion of the atmosphere, external to buildings, to which the general public has access,” and further that “the exemption from ambient air is available only for the atmosphere over land owned or controlled by the source and to which public access is precluded by a fence or other physical barriers” (EPA 2018c). More recent EPA policy expanded the range of measures that could be implemented to exclude the public from access, such as signage, monitoring of access, security surveillance, and similar effect measures (EPA 2019).³

The road between Stibnite Road at Sugar Creek and Thunder Mountain Road at Meadow Creek is to be used as a public access road. The public is accessing the road and is not being excluded. Therefore, the road must be considered ambient air. The Project’s controlling public access is irrelevant. The relevant factor is that the public is not excluded; the only way to make the road meet the Environmental Protection Agency’s ambient air definition is to exclude the public from accessing the road. As the public access road is ambient air, all emissions, modeling, and controls must be characterized and considered, and subject to the NAAQS.

On-site Landfarm

The potential for fugitive dust and volatile organic compound (“VOC”) emissions from the on-site landfarm has not been included in the emissions inventory. The Project will be operating a landfarm on the Project site, as identified in the U.S. Forest Service Stibnite Gold Project Draft Environmental Impact Statement:

2.3.5.12 On-site Landfarm

A landfarm (i.e., a biological waste treatment process for treating hydrocarbon contaminated soils via spreading and tilling/aerating) would be maintained on approximately 2 to 3 acres of private land. The landfarm and materials to be added would be sampled, characterized, constructed, operated, and monitored in accordance with all applicable local, state, and federal regulatory requirements.⁴

As identified by the Federal Remediation Technologies Roundtable, “[l]andfarming sites must be managed properly to prevent both on-site and off-site issues with contamination. Leachate collection, fugitive dust emission control, adequate monitoring, and environmental safeguards are required.”⁵ Landfarm emissions should be characterized and subject to facility-wide fugitive dust and VOC control requirements.

Access Road Mileage

The modeling assumptions used for the access road are incorrect. The modeling assumptions in Table 29 of the Statement of Basis state the access road length is 1.6 miles within the Project

³ U.S.D.A Forest Service, *Stibnite Gold Project Draft Environmental Impact Statement* at 3.3-1 to -2 (Aug. 2020) (emphasis added).

⁴ Id. at pg. 2-55.

⁵ Federal Remediation Technologies Roundtable, *Landfarming*, <https://frtr.gov/matrix/Landfarming/#Description> (last visited Oct. 9, 2020).

boundary, however, the access road proposed by Midas Gold is longer, either three or four miles in length depending on the option.

Density of Limestone in Modeling

The density of limestone in the modeling is unrealistically low at 1.09 g/cm³. A more universally accepted range for limestone density should be used in the modeling.

Permit Requirements and the Permitting Process Are Inadequate to Ensure NAAQS Compliance

Permit Conditions for Fugitive Emissions Controls Are Not Achievable

The PTC permit requires 93.3 percent fugitive dust emissions control to demonstrate compliance with the 24-hour PM₁₀ NAAQS. This is an extremely high level of control, and the importance of achieving such a high level of control to assure NAAQS compliance is acknowledged by the IDEQ permit writer and modeling staff:

Reduction of PM emissions from haul roads by a combined 93.3% was supported by assuming appropriate application of water and magnesium chloride dust suppression; DEQ is cognizant that **to consistently achieve this level of control requires conscientious efforts, vigilant inspection and monitoring, and a comprehensive FDCP.**⁶

In particular, **it may prove challenging to consistently and continuously achieve the targeted level of fugitive dust control for emissions from traffic on unpaved roadways,** with over 55 miles of haul truck routes within the mining operations boundary, a fleet of 32 haul trucks weighing between 37 and 357 tons, and a targeted dust control efficiency of 93.3% accomplished by application of both dust suppressant and water controls.⁷

The Tribe believes 93.3 percent fugitive dust emissions control is an unachievable level of control and, therefore, the Project will violate the PM₁₀ NAAQS.

Fugitive Dust Control Plan and Operations and Maintenance Plan have No Timely Public Comment Component

These plans are critical to meeting the requirements of the PTC permit and meeting the NAAQS and are submitted by Midas Gold within 60 days after issuance of the PTC permit. However, the public's opportunity to comment on these plans will not be available until after IDEQ issues a draft Tier I air operating permit. Midas Gold must apply for a state of Idaho Tier 1 air operating permit within 12 months after a gold mining emissions unit is built, however, the issuance of the draft Tier I air operating permit may not occur until a year or two later. This means that the Project could be operating air emissions sources for up to three years before the Tribe and the public have an opportunity to comment on the fugitive dust control plan and the operations and maintenance

⁶ IDEQ, *Statement of Basis Permit to Construct No. P-2019.0047 Project ID 62288 Midas Gold Idaho, Inc. Stibnite, Idaho Facility ID 085-00011* (Sept. 2020) at 40, <http://www.deq.idaho.gov/media/60184739/midas-gold-ptc-statement-of-basis-0920.pdf> (emphasis added).

⁷ Id. at 20 (emphasis added).

plan. Strict adherence to these plans is critical to ensuring compliance with meeting the NAAQS, and giving the public and the Tribe the opportunity to review and comment early and often as these plans are developed and finalized is, therefore, necessary and appropriate.

Potential for Delays in Midas Gold Construction and Impacts to the Tribe's and Public's Ability to be Fully Informed on PTC Application

If Midas Gold does not commence construction of an emissions unit within two years, and an extension to the PTC permit is needed, the IDEQ should re-open the tribal and public comment period. Midas Gold is sure to be revising its proposed construction and operations scenarios during that time, which will lead to revisions in emissions scenarios and updated PTC permit application submissions. IDEQ should provide the public with the opportunity to comment on a PTC permit renewal and any updated application materials submitted by Midas Gold since its original application.

The State of Idaho's Internal Controls and Program Resources are Inadequate to Guarantee Permit Conditions Will Be Met

IDEQ's consistent, vigilant, comprehensive, and continuous surveillance and monitoring for assurance of permit compliance will be critical to ensuring the Project is meeting the 93.3 percent fugitive dust control PTC permit requirements that guarantee PM10 NAAQS are met and human life, animal life, and vegetation, and the Tribe's Treaty-reserved resources are not injured or unreasonably affected. However, the state of Idaho lacks the robust compliance assurance, monitoring, and enforcement resources that will be necessary to inspect and regulate such a facility in a remote location and ensure the Project is meeting permit conditions and not violating the NAAQS. The minimum inspection frequency required of a PTC permit is once every five years. Given the extraordinary level of fugitive emissions controls necessary to achieve 93.3 percent control, and the State's own acknowledgment that this level of control will be very challenging, a once every five years inspection frequency is woefully inadequate to ensure NAAQS compliance. IDEQ's own compliance monitoring and enforcement resources for the Project should, at a minimum, include weekly on-site inspections, establish a multi-site, continuous ambient emissions monitoring network, and install web-camera monitoring. There is no indication that IDEQ has this level of program resources available to accomplish their responsibilities under the Clean Air Act to implement and enforce PTC permit conditions and ensure the NAAQS are not violated.

Conclusion

Due to inadequate emissions characterizations and proposed pollution-emitting source permit requirements—combined with inadequate state compliance monitoring and enforcement resources—constructing and operating the Stibnite Gold Project without causing or contributing to a violation of the federal Clean Air Act's primary and secondary National Ambient Air Quality Standards for PM10 is not achievable. Construction and operation of the Stibnite Gold Project will therefore injure or unreasonably affect human or animal life or vegetation and the Nez Perce Tribe's Treaty-reserved resources. Idaho Department of Environmental Quality must accordingly deny the Midas Gold application.